United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2571 B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

FRANCIS BLOETH, :

Appellant, :

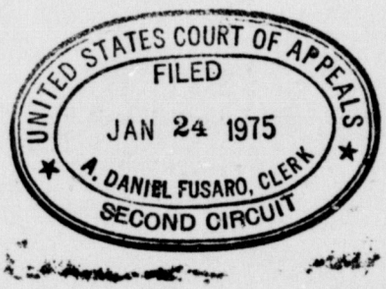
-against- : No. 74-2571

ERNEST L. MONTANYE, Superintendent, :

Appellee. :

- -X

BRIEF FOR PLAINTIFF-APPELLANT



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QUESTIONS PRESENTED

1. Whether the District Court erred in not granting summary judgment to appellant on the grounds that appellee had failed to provide him with a statement of the evidence upon which his confinement in HBZ was based.

2. Assuming arguendo that appellant was not entitled to summary judgment, whether material issues of fact existed in the record which should have precluded the District Court from granting summary judgment to appellee.

STATEMENT OF THE CASE

This appeal is from an order of the United States District Court for the Western District of New York (Curtin, J.) dismissing appellant's pro se civil rights complaint (A.34-36).*

Appellant Frances Bloeth, a New York state prisoner, brought this action for injunctive relief and damages to challenge his alleged arbitrary confinement in Housing Block Z (HBZ), the disciplinary segregation unit at the Attica Correctional Facility, Attica, New York. In his complaint (A.3-4)** and subsequent affidavits submitted to the District Court (A.27-33), Mr. Bloeth stated that on June 14, 1973 he was transferred from the Adirondack Correctional Treatment and

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* Although the District Court stated that it was dismissing the complaint, it appears that the Court, having requested and relied upon information not contained in the pleadings, was in fact granting summary judgment to the appellee. See United States ex rel. Haymes v. Montayne, 1974 Adv. Sh. 21, 25 (2d Cir. October 4, 1974) ("Since there is no indication that Judge Curtin found Haymes's claims to be frivolous, see 28 U.S.C. §1915(d), and because he considered matters outside the pleadings, see F.R. Civ. P. 12(b) his disposition perforce was summary judgment F.R.Civ. P. 56.").

** Appellant initiated this action by means of a handwritten letter to the District Court on June 15, 1973, the day on which he was placed in HBZ. Although this letter is uncaptioned it specifically requests relief under 18 U.S.C. §1983 and 42 U.S.C. §1942 and the court below properly considered it a civil rights action under those sections. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Evaluation Center (ACTEC) in Dannemora, New York to Attica and was placed in HBZ the following day. Bloeth claimed that he was never informed of the existence of any disciplinary charges which led to his confinement in the disciplinary housing block nor afforded a hearing at which he could respond to any such charges. He further claimed that he was never given any indication as to how long his confinement in segregation would continue. Bloeth alleged that he had never been punished for any misconduct while confined in ACTEC and that his transfer to Attica had been accompanied by a recommendation that he be placed in a college program and employed in the prison law library.

Bloeth claimed that during his confinement in HBZ he was denied various rights and opportunities afforded inmates in the general population at Attica including the right to intermingle with other inmates, the right to work, attend educational classes and religious services and the right to engage in recreational activities. Bloeth sought injunctive relief releasing him from HBZ and expunging his prison record of any reference to his placement there, as well as damages for illegal confinement in the segregation unit.

On July 9, 1973 the District Court ordered appellee Montanye to state in detail the facts underlying the decision to confine Bloeth in segregation. In addition the Court ordered Montanye to "state whether Department of Corrections procedures pertaining to prisoner disciplinary hearings were followed" and to "describe the safeguards provided petitioner at any hearings held" (A.6-7).

On July 20, 1973, in response to the District Court's order, Montanye submitted the affidavit of Harold Smith, Deputy Superintendent of Attica, along with several documents (A.9 - 20a). In his affidavit Smith stated that Bloeth had been placed in HBZ "protective custody" in accordance with his recommendation. He further stated that the basis of his recommendation was as follows:

> [P]etitioner has made a rather poor institutional adjustment during the years of his incarceration and he has compiled numerous disciplinary reports. The petitioner is in constant defiance of institutional regulations and rules both in this facility and other facilities throughout the State. He presents a clear and eminent danger to the facility, its employees and inmates because of his past actions and current attitude.

It appears that Smith, in making his recommendation, had relied entirely upon a "Protective Admission and Custody

Assignment Review" report written by one Gerald Elmore (A. 14).* The report, marked "Confidential," is attached to Smith's affidavit.

In regard to the procedures followed by appellee Montanye in Bloeth's case, Smith stated that he was attaching to his affidavit "form 251-C, pages 1&2," given to Bloeth on June 15, 1973, which allegedly "indicated to him why he was being placed in protective custody." However, although three of the documents annexed to Smith's affidavit bear the notation "form 251-C-1" in the upper left hand corner, none of these documents contain any statement of the reasons why Bloeth was placed in protective custody. They merely provide spaces for Bloeth to consent or not consent to his confinement in "protective custody," and advise him of his right to protest his confinement in writing to the Superintendent or the Commissioner. The first Form 251-C-1 received by Bloeth was signed by him on June 20, 1973; on the form he refuses to consent and writes that "I have no knowledge of what Departmental regulation I have violated" and that "I have no funds for stamps" to write

* This report, which is undated, uses language which is almost identical to that used in the Smith affidavit.

to the Commissioner. The second Form 251-C-1 is blank except for a notation by one Sergeant A. Plowe that on June 27, 1973, Bloeth refused to sign the form. The third Form 251-C-1 was signed by Bloeth on July 11, 1973; on this form he again refuses to consent and writes that "I still don't know what rule I violated since arrival at Attica on June 14, 1973."

The remaining documents annexed by Smith bear no numerical identification. They include two documents entitled "Superintendent's Review" and marked "Confidential," on which appellee Montayne confirms Bloeth's assignment to protective custody; and the Elmore report, also marked "Confidential," to which Bloeth's criminal record is attached. The record below does not indicate whether Bloeth received any of these documents.

Smith's affidavit of July 20, 1973 also asserts that "I am personally seeing petitioner Francis Bloeth every week and when, as a result of our discussions, I feel that it would be to the advantage of petitioner Bloeth, and the facility for him to return to regular population, I will certainly recommend it." There is no indication in the record, however, of Smith having informed Bloeth of any specific charges upon which his segregated confinement was based or having elicited

Bloeth's response to any such charges.

On or about July 20, 1973, the date of Smith's affidavit, Bloeth was released from HBZ. He had been there 35 days (A.28). The instant case continued with regard to his request for expungement of his prison record and damages.

On December 13, 1973, the District Court entered a further order directing Montanye to inform the court of the factual basis for the judgment that Bloeth represented "a clear and imminent danger to the facility, its employees, and inmates because of his past action and current attitude" (A.21-23).

On January 2, 1974 Montanye submitted an additional affidavit of the Deputy Superintendent in response to the court's order. Smith claimed that institutional records contained the following in regard to Bloeth:

> (1) Ten months earlier, he had been under investigation at Clinton Correctional Facility. The nature or the results of the investigation were not stated.
>
> (2) While at ACTEC, he had refused to submit to a rectal examination after a double edged razor was found in his cell. Smith conceded that Bloeth was only cautioned on that occasion. (A.25-26)

On January 8, 1974, appellant Bloeth submitted two affidavits to the Court. In the first he denied ever having received any

disciplinary reports for the alleged incidents noted in Smith's affidavit and asserted that he had a good disciplinary record at Attica and other institutions throughout the state. He noted that during his previous confinement at Attica he had held the position of Kitchen Clerk and had been one of only six inmates who had passes permitting unescorted movement throughout the facility at all times (A.31-33). In the second affidavit Bloeth stated that he was unable to respond fully to Deputy Superintendent Smith's affidavits because he had forwarded all the documents in his possession to an attorney in Buffalo who had failed to return them (A.27-29).

On June 7, 1974 the District Court, after reviewing the affidavits submitted by each party, dismissed Bloeth's complaint. The Court found that "the action taken by [the] prison authorities was within the discretionary authority normally given them in the area of prison administration. See Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)" (A.34-36).

Appellant Bloeth's motion for assignment of counsel and for leave to appeal in forma pauperis was granted by this Court on December 4, 1974.

By this Court's order of December 9, 1974 William E. Hellerstein and Joel Berger of Prisoners' Rights Project, Legal Aid Society were assigned as counsel for appellant.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO APPELLANT ON THE GROUNDS THAT APPELLEE HAD FAILED TO PROVIDE HIM WITH A STATEMENT OF THE EVIDENCE UPON WHICH HIS CONFINEMENT IN HBZ WAS BASED.

In Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971), the governing precedent in the instant case,* this Court outlined the basic test for determining the extent to which procedural safeguards are constitutionally required in the prison setting. In Sostre the court held

> If substantial deprivations are to be visited upon a prisoner, it is wise that such actions should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions (citations omitted). 442 F.2d at 198

* In Wolff v. McDonnell 418 U.S. 539, fn. 19 (1974) the Supreme Court held that where there is a "major change in the conditions of [an inmate's] confinement there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for the punishment" and set down the minimum safeguards which must be accorded. Wolff however was specifically held to be nonretroactive. Since the relevant facts in the instant case arose prior to Wolff, Sostre, which was the governing case law at the time, must be applied here.

The record before this Court, viewed even in the light most favorable to appellee prison officials, establishes that Bloeth was denied what is perhaps the most basic requirement of Sostre - the right to be informed of the evidence against him. Accordingly the District Court should have ordered that he be granted summary judgment. See U.S. v. Diebold, 369 U.S. 654,655 (1962).

For purposes of this point, appellants will assume arguendo a questionable fact in appellee's favor: that the confidential Elmore report attached to Smith's affidavit was among the papers given to Bloeth. Even assuming that Bloeth saw the report, this document does not contain information sufficient to satisfy the Sostre requirement that he be informed of the evidence against him. Instead the report simply contains vague and conclusory statements indicating that he was placed in protective custudy because he was "in constant defiance of institutional rules," because of his previous "involvement" at Attica and other institutions, and because he presented a"clear and eminent danger to the facility". Such allegations are so uninformative that they render an adequate response virtually impossible, and accordingly they defeat the basic Sostre purpose of rational fact finding.

Indeed it is clear that in the absence of a more specific statement of the evidence relied on any fact-finding hearing is rendered totally meaningless. Morrissey v. Brewer, 408 U.S. 471, 486-487 (1972).

The need for a specific statement of the evidence relied on is much greater, where, as here, a prisoner's segregated confinement is based upon dire predictions of that prisoner's future acts rather than upon specific past incidents. In such instances, the danger that such statements may be used as a disguise for arbitrariness is so great that it is mandatory that these predictions be premised upon substantial evidence and not upon mere speculation and undifferenciated fears. Goodwin v. Oswald, 462 F.2d 1237, 1244-45 (2d Cir. 1972); Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968). See also Davis v. Lindsay, 321 F.Supp. 1134,1138 (S.D.N.Y. 1970); Inmates of Milwaukee County Jail v. Peterson, 353 F.Supp. 1157, 1169 (E.D. Wis. 1973); Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). In fact appellee's own rules and regulations require no less.*

* 7 N.Y.C.R.R. Ch. 6 § 304.3(a) provides that a protective admission to a special housing unit must be predicated upon substantial evidence that such action is necessary. Section 304.1(b) states that protective admission applies where a prisoner "must, for good cause, be restricted from communication with the general population".

That the vague and conclusory statements used in Bloeth's case were, in fact, nothing more than a disguise for arbitrarine can be easily inferred from the record in this case. The District Court, apparently unsatisfied with the prison officials reference to Bloeth's "constant defiance of institutional regulations and rules" demanded that appellee Montayne submit an affidavit outlining the factual basis for that statement. Even under this prodding, however, appellee was only able to make a cryptic reference to a prior "investigation" of appellant and point to a single minor disciplinary infraction for which Bloeth was merely counselled.*

There is no question that the appellee was required to employ the procedural protection mandated in Sostre in confining Bloeth in the disciplinary segregation area at Attica. The deprivations which were visited upon him as a result of his extended confinement in the disciplinary segregation unit were clearly "substantial" within the meaning of the Sostre holding. It is uncontested that during the thirty-five days

* 7 N.Y.C.R.R., Ch. 5 §251.5(a) states
An employee should deal with minor infractions, or other violations of rules and policies governing inmate behavior, that do not involve danger to life, health, security or property by counseling, warning, and/or reprimanding the inmate, and the employee need not report such minor incidents.

in which he was confined in HBZ, he was not permitted to intermingle with other prisoners, participate in the institution's educational and recreational programs nor permitted to attend religious services.* Furthermore, unlike those New York State prisoners who are confined in segregation as a result of disciplinary action** Bloeth never had any indication as to how long his segregated confinement would continue.

It is irrelevant to the inquiry as to whether or not the Sostre safeguards attach in this case that the prison officials chose to label Bloeth's confinement as "protective" rather than punitive. The courts, in determining the extent to which due process protection must be accorded a prisoner, have consistently looked beyond such labels to the actual deprivations

* It is quite possible that Bloeth suffered even greater deprivations in HBZ than those set forth in the limited pro se papers before this Court. In United States ex rel. Walker v. Mancusi, 338 F.Supp. 311, 313 (W.D.N.Y. 1971) (Curtin, J.), aff'd 467 F.2d 51 (2d Cir. 1972) the court found that prisoners confined in HBZ were denied newspapers, magazines and the use of radio earphones. They were not permitted to make purchases from the commissary, or to receive packages from the outside world. Their exercise facility was limited. In Carter v. McGinnis, 320 F.Supp. 1092 (1970) (Curtin, J.) the state stipulated that men confined to HBZ were entirely forbidden from mixing with other prisoners. Their food was served in their cells, and their normal prison clothing was reduced.

** See generally 7 N.Y.C.R.R., Ch. V, §252.5 and 253.5.

incurred by the inmate. Newkirk v. Butler, 499 F.2d 1214, 1217, cert. granted 43 U.S.L.W. 3239 (Oct. 22, 1974); U.S. ex rel. Walker v. Mancusi, 338 F.Supp. 311, 317 (W.D.N.Y. 1971) aff'd 467 F.2d 51 (2d Cir. 1972); Howard v. Smyth, 365 F.2d 428,429 (4th Cir. 1966); Smoake v. Fritz, 320 F.Supp. 609, 611 (S.D.N.Y. 1970). Here there can be little doubt that due to the severity of the deprivation suffered by Bloeth he was entitled to the minimum due process protection outlined in Sostre, regardless of the label given to his confinement.

As demonstrated by the foregoing, Bloeth was entitled to the basic due process component of notice of the charges against him. Under any reading of instant record, the prison authorities failed to provide him with such notice. This failure was in violation of Bloeth's rights as set forth in Sostre. Summary judgment should therefore be granted in his favor, and this case remanded for further determination of the issues of liability and damages.

POINT II

ASSUMING ARGUENDO THAT APPELLANT WAS NOT ENTITLED TO SUMMARY JUDGMENT, MATERIAL ISSUES OF FACT EXISTED IN THE RECORD WHICH SHOULD HAVE PRECLUDED THE DISTRICT COURT FROM GRANTING SUMMARY JUDGMENT TO APPELLEE.

Even if this Court should find that receipt of the confidential Elmore report would have been sufficient to satisfy the Sostre requirement that Bloeth be informed of the evidence against him, reversal would nevertheless be required in this case. Although such a finding would necessitate the holding that Bloeth was not entitled to summary judgment, the record still contains material issues of fact as to 1) whether Bloeth actually received the Elmore report and 2) whether he was accorded a hearing at which he could respond to the charges therein, as required by Sostre. Under these circumstances, the court below erred in granting summary judgment to appellee prison authorities.

Summary judgment is appropriately granted where there is no genuine issue as to any material fact and where the moving party is entitled to a judgment as a matter of law. F.R.Civ. P. 56(c). In applying this rule the Courts have been cognizant of a litigant's right to a trial, and have sanctioned its use

only where there is not the "slightest doubt as to the facts" and where a trial would serve no useful purpose. Doehler Metal Furniture Co. v. United States, 149 F.2d 130,135 (2d Cir. 1945); See also Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628-629 (1944).

Since summary judgment does not contemplate a trial by affidavit the trial courts must closely scrutinize the movant's papers, while the opposing papers are liberally construed in determining whether movant has satisfied his burden. 6 J. Moore ¶56.11 [1.-2] and ¶56.15(3) (2d ed. 1974). This principle has special meaning where, as in the instant case, the opposing party is proceeding pro se and is unskilled in preparing pleadings and court papers. Cf. Haines v. Kerner, 404 U.S. 519 (1972).

As has been established in Point I, appellee Montayne in placing Bloeth in segregation was required to employ the due process safeguards set down in Sostre v. McGinnis, supra. Specifically, Montayne was required to inform Bloeth of the charges and evidence against him and to afford him a reasonable opportunity to respond. The record below, when viewed in the light most favorable to appellant, presents substantial

questions as to whether Bloeth was in fact afforded the Sostre safeguards.

a. The record presents a factual question as to whether Bloeth received a copy of the confidential Elmore report.

Assuming arguendo that Bloeth's receipt of the confidential Elmore report would have satisfied the Sostre requirement that he be informed of the evidentiary basis for his confinement (see Point I supra), it is by no means clear from the record that Bloeth was ever given this document. Although Smith's affidavit of July 20, 1973 states that Bloeth was given copies of documents indicating the reasons for his segregated confinement, it is impossible to determine which of the numerous documents attached to Smith's affidavit he actually received (see pp.5-6 infra). As there is nothing else in the record which would indicate that Bloeth had received a statement of the evidence against him, the question whether he received the Elmore report is material to the central issue of whether Bloeth was deprived of due process of law.

b. The record presents a material question of fact as to whether Bloeth was afforded a hearing in regard to his confinement in segregation.

It is equally unclear from the record whether or not Bloeth was afforded a hearing at which he could respond in

person to the allegations against him, and at which a true rational inquiry into the facts underlying his confinement could take place. While Deputy Superintendent Smith alleges that he met with Bloeth on a weekly basis he does not indicate the content or purpose of any discussions held. Thus, the material issue of whether or not any of these meetings constituted a hearing within the meaning of Sostre and its progeny remains very much in question.*

Although it is true that Sostre itself does not specifically use the word "hearing" in outlining the minimum requirements for due process in the prison setting, subsequent decisions of this Court have assumed that hearings are required by the holding in that case. See e.g. Newkirk v. Butler, supra; U.S. ex rel. Haymes v. Montanye, supra; Nieves v. Oswald, 477 F.2d 1109 (2nd Cir. 1973). Indeed in only one case has the court been willing to relax the requirement of a hearing prior to

* By his affidavits of January 8, 1974 (A.27-29) Bloeth informed the District Court that he lacked sufficient information to reply to the prison authorities charges because he had sent court papers to an attorney in Buffalo which were never returned. Had the court exercised its discretionary power to grant a continuance to permit Bloeth to fully respond, some factual ambiguities in the record might very well have been resolved F.R.Civ.P. 56(e).

the placement of an inmate in more restrictive confinement. In that case, U.S. ex rel. Walker v. Mancusi, 338 F.Supp. 311 (W.D.N.Y. 1971) (Curtin, J.) aff'd 467 F.2d 51 (2d Cir. 1972), the court affirmed a decision of the District Court which authorized a procedure in lieu of a hearing, whereby an inmate who was placed in restrictive confinement would be informed of the evidence against him, and then afforded the opportunity to communicate with the Superintendent in writing in response to that evidence. The decision in Walker however turned upon a highly unique set of facts which are clearly not paralleled in the instant case.

In Walker, the plaintiffs, inmates charges with being "active participants" in the bloody confrontation that occurred at Attica in September 1971, were placed in protective custody status in A Block 6 Company. Although the conditions in that housing area were more restrictive than those in the general population of Attica, the District Court found they were far less onerous than those which existed in HBZ, the disciplinary segregation unit of the prison.* In view of these less

* The Court found that, unlike those prisoners in HBZ, the prisoners confined in A Block were allowed newspapers, magazines and the use of radio ear phones. They were allowed to make purchases from the institution's commissary and to receive packages from friends and relatives. In addition their exercise facility was larger than that in HBZ.

conditions and in view of the unique circumstances surrounding their confinement this court concluded that the procedures used in that case; "while not as precise or detailed as might be required under other conditions, were sufficient to satisfy minimum requirements of "fair play" 467 F.2d at 53-54.

The record before the District Court in this case, although sparse, evinces a far different set of circumstances than those found in Walker. Bloeth's confinement did not arise in the aftermath of the Attica uprising or in the aftermath of any prison disturbance whatsoever. Although the motives of the prison authorities in confining Bloeth are not clear from the record, there is no indication that his was anything other than an individual case unrelated to any larger unrest. Furthermore, Bloeth's confinement was in HBZ, the same housing block in which inmates found guilty of institutional infractions are placed for purposes of punishment.* Unlike the plaintiffs in Walker, Bloeth must be assumed to have suffered the same deprivations as punished inmates.

* See p. 13, supra.

Accordingly, the more relaxed procedures set down in Walker could not have satisfied the mandates of minimum due process in the instant case. Instead what was required was a hearing at which Bloeth could appear in person to respond to the charges against him. As stated previously whether or not he received such a hearing is unclear from the record.

In summary, the record before the District Court revealed material disputes of fact which were central to the issues in this case. The District Court, in granting summary judgment to Montanye chose to accept his version of the facts and thus denied Bloeth the opportunity to have these disputes resolved at trial. In so doing, the court below clearly committed reversible error.

CONCLUSION

FOR THE ABOVE STATED REASONS THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED.

Respectfully submitted,

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Dated: New York, New York
January 24, 1975

CERTIFICATE OF SERVICE

This is to certify that I have this 24th day of January, 1975, served a copy of the foregoing Brief for Plaintiff-Appellant and Appendix on the appellee by mailing, via United States Mail, postage prepaid, a copy of the same to Arlene Silverman, Assistant Attorney General for the State of New York, attorney for appellee, at Two World Trade Center, New York, New York 10047.

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